

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

SWINOMISH INDIAN TRIBAL  
COMMUNITY,

Plaintiff,

v.

BNSF RAILWAY COMPANY,

Defendant.

Cause No. C15-0543RSL

ORDER REGARDING THE  
SCOPE OF THE PROPOSED  
WAIVER AND LEAVE TO  
DISCLOSE EXPERT  
WITNESS

This matter comes before the Court on “Defendant BNSF Railway Company’s Motion (1) Regarding Scope of Proposed Waiver of Privilege and (2) For Leave to Disclose Expert Witness.” Dkt. # 181. In the context of determining whether either party was entitled to summary judgment regarding plaintiff’s claim that BNSF’s intentional trespass was willful, the Court stated:

There is still, however, a question of fact regarding BNSF’s consciousness of wrongdoing. If, as it repeatedly asserts, BNSF had a good faith belief that its role as a common carrier compelled it to exceed the limitations of the Easement Agreement, BNSF may not have been conscious of wrongdoing. Outside counsel for BNSF asserts that, throughout the negotiations between the parties, “BNSF believed that it was obligated to serve Marathon’s cargo needs as required by its federal common carrier obligation.” Dkt. # 148 at 3. BNSF made similar assertions in its 2015 correspondence with the Tribe. The basis for the purported belief is unclear, however. We now know that BNSF’s common carrier obligations

1 do not, in fact, trump the promises it made to the Tribe in order to gain a right of  
2 access across the Reservation in the first place. There is also reason to suspect that  
3 common carrier obligations are inapplicable to cargo transported under a contract  
4 and/or where the limitation on carriage arises from the nature of the cargo or  
5 restrictions in capacity (as opposed to discrimination among shippers). The lack of  
6 evidence regarding BNSF's evaluation of its common carrier obligations  
7 combined with the significant income associated with the transportation of Bakken  
8 crude oil for Tesoro/Marathon creates a fact issue regarding BNSF's  
9 consciousness that the Court declines to resolve in the context of a motion for  
summary judgment. Thus, whether disgorgement is an available remedy for the  
trespass at issue here will have to be decided at trial.

10 Dkt. # 174 at 26. In order to address the evidentiary gap, BNSF seeks to have its outside  
11 counsel, Stephen DiJulio, testify at trial regarding his communications with BNSF regarding its  
12 common carrier obligations and would like to disclose a new expert, John Scheib, to testify  
13 regarding the railroad industry's understanding of the common carrier obligation during the  
14 relevant time period.  
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#### 17 **A. Proposed Waiver of the Attorney-Client Privilege**

18 Pursuant to Federal Rule of Evidence 502(a), when a party voluntarily waives the  
19 attorney-client privilege with regards to a particular communication or document, the waiver  
20 extends to other undisclosed communications only if "(1) the waiver is intentional; (2) the  
21 disclosed material and the undisclosed communications or information concern the same subject  
22 matter; and (3) they ought in fairness to be considered together." The waiver of privilege "is  
23 reserved for those unusual situations in which fairness requires a further disclosure of related,  
24 protected information, in order to prevent a selective and misleading presentation of evidence to  
25 the disadvantage of the adversary." Fed. R. Evid. 502(a) advisory committee's note. BNSF  
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1 requests that the Court establish the scope of the waiver that would occur if Mr. DiJulio were  
2 called to testify as to BNSF's understanding and consideration of its common carrier obligations  
3 and its impact on the Easement Agreement, arguing that the waiver should reach only the  
4 universe of communications that (1) Mr. DiJulio sent or received *and* (2) which involved a  
5 discussion of either common carrier obligations or preemption issues. Neither limitation is  
6 appropriate. The issue is not whether Mr. DiJulio believed or was told that BNSF's role as a  
7 common carrier compelled it to exceed the limitations of the Easement Agreement,<sup>1</sup> but rather  
8 whether BNSF actually held that belief based on a reasonable investigation and evaluation of the  
9 competing obligations imposed by the Easement Agreement, the Indian Right of Way Act, and  
10 BNSF's common carrier status. This inquiry must be asked and answered at various points in  
11 time, particularly in the year before BNSF began running unit trains over the Reservation in  
12 September 2012, when BNSF first raised the common carrier argument in its discussions with  
13 the Tribe, and throughout the trespass as more and more information came to light.

14 BNSF wants Mr. DiJulio to testify that BNSF mistakenly, but honestly, believed that its  
15 common carrier obligations trumped its obligations under the Easement Agreement. It is willing  
16 to waive the privilege as to conversations to which Mr. DiJulio was a party and which  
17 specifically mention common carrier or preemption issues. But there were undoubtedly  
18 conversations regarding the pros and cons of running unit trains that did not involve Mr. DiJulio,  
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26 <sup>1</sup> BNSF is not relying on an advice-of-counsel defense, but is rather intending to use Mr. DiJulio  
27 as a conduit for expressing how BNSF itself assessed its common carrier obligations. Dkt. # 185 at 8  
28 n.4.

1 and the Tribe is not unreasonable in thinking that there may be communications and documents  
2 suggesting that something other than the imperatives of its common carrier status motivated  
3 BNSF's decision. BNSF cannot rely on communications with counsel to prove its intent or  
4 motivation while depriving the opposing party of other privileged materials that may contradict  
5 its claim. *Bittaker v. Woodford*, 331 F.3d 715, 719 (9th Cir. 2003).  
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8 If BNSF chooses to waive the attorney-client privilege with regards to its conversations  
9 with Mr. DiJulio related to common carrier and/or preemption issues, the waiver will extend to  
10 all communications regarding its decision to run unit trains over the Reservation from 2011 to  
11 the present, regardless whether Mr. DiJulio were a participant in the communications and  
12 regardless the justification, analysis, or reasoning for the decision that is reflected in the  
13 communication.  
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#### 15 **B. Extension of Time in Which to Disclose Expert**

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17 BNSF hopes to have Mr. Scheib testify regarding industry standards related to common  
18 carrier obligations and how a reasonable railroad executive would have understood and  
19 prioritized the competing obligations presented in this case. The deadline for disclosing expert  
20 witnesses was April 2021. The parties agree on the factors to be considered when a party seeks  
21 to reopen discovery under Federal Rule of Civil Procedure 16:  
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24 1) whether trial is imminent, 2) whether the request is opposed, 3) whether the  
25 non-moving party would be prejudiced, 4) whether the moving party was diligent  
26 in obtaining discovery within the guidelines established by the court, 5) the  
27 foreseeability of the need for additional discovery in light of the time allowed for  
28 discovery by the district court, and 6) the likelihood that the discovery will lead to  
relevant evidence.

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2 *City of Pomona v. SQM N. Am. Corp.*, 866 F.3d 1060, 1066 (9th Cir. 2017). In analyzing these  
3 factors, the primary consideration is the diligence of the party seeking to amend the case  
4 management deadlines. *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir.  
5 1992).  
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7       The relevant factors are fairly evenly split. Although the trial date is more than two  
8 months away, significant additional discovery will be necessary if a new expert is introduced at  
9 this point in the litigation. The request is opposed, but plaintiff's claim of prejudice is based  
10 primarily on the timing of the disclosure. With regards to diligence and foreseeability, plaintiff  
11 has the better of the argument. The deadline for expert disclosures was set after the Ninth Circuit  
12 determined the preemption issue against BNSF, and BNSF had more than eight months to meet  
13 plaintiff's assertion that it was entitled to disgorgement of any and all profits garnered from  
14 BNSF's knowing exceedances of the Easement Agreement limitations. At that point, having lost  
15 the argument that its common carrier obligations justified the breach of the Easement  
16 Agreement and realizing that its state of mind was at issue, BNSF should have predicted that  
17 merely asserting a belief in the debunked common carrier theory would not carry the day.  
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22       The Court finds that the balance of five out of six factors (including the most important of  
23 the factors) counsels against allowing the late disclosure of a new expert. The last factor,  
24 relevance, could even out the scales in favor of the late disclosure if BNSF were to offer  
25 privileged communications tending to show that it did, in fact, believe that its common carrier  
26 obligations compelled it to run unit trains over the Reservation despite the terms of the  
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1 Easement Agreement and the Tribe's objections. In those circumstances, Mr. Scheib's testimony  
2 would support and bolster that evidence. If, on the other hand, BNSF declines to waive the  
3 privilege and opts not to produce any evidence regarding its actual decision-making process,  
4 motivations, and/or analysis during the relevant period, Mr. Scheib's abstract testimony  
5 regarding what a reasonable railroad executive would have understood about her competing  
6 obligations – untethered to any evidence about what BNSF, in fact, understood – would have  
7 almost no probative value and the balance of the factors would tilt decidedly against reopening  
8 discovery.  
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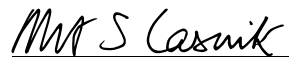
13 For all of the foregoing reasons, BNSF's motion for a determination of the scope of the  
14 proposed waiver and for leave to disclose a new expert witness is conditionally GRANTED in  
15 part. BNSF's proposed waiver of the privilege would require the disclosure of all  
16 communications regarding its decision to run unit trains over the Reservation from 2011 to the  
17 present, regardless whether Mr. DiJulio were a participant in the communications and regardless  
18 the justification, analysis, or reasoning for the decision that is reflected in the communication. If  
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1 BNSF elects to proceed with the waiver, it shall produce the expert report of Mr. Scheib within  
2 three days of the date of this Order and shall produce the waived communications within  
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4 twenty-one days of the date of this Order. Failure to make both productions will be deemed an  
5 election not to proceed with the waiver.  
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8 Dated this 9th day of January, 2023.

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10 Robert S. Lasnik  
11 United States District Judge  
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